No. 80811-2

THE SUPREME COURT OF

THE STATE OF WASHINGTON

C/A No. 35219-2-II

JAMES TOMLINSON, PETITIONER,

v.

PUGET SOUND FREIGHT LINES, RESPONDENT

and

DEPARTMENT OF LABOR & INDUSTRIES

OF THE STATE OF WASHINGTON, DEFENDANT

SUPPLEMENTAL BRIEF OF RESPONDENT PUGET SOUND FREIGHT LINES

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RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT PUGET SOUND FREIGHT LINES

A. Incorporation of Respondent's Brief by Reference.

Pursuant to RAP 13.7(1), Puget Sound Freight Lines (hereafter "employer") understands this Court has reviewed or will review the Respondent's Brief that employer filed with the Court of Appeals on January 24, 2007. That brief details employer's response to most of the arguments reiterated by Tomlinson in his Petition for Review filed October 6, 2007 (hereafter "Petition"). To the extent necessary, employer incorporates that brief by reference here. Employer submits this Supplemental Brief to correct, rebut or offer its perspective on selected aspects of the Petition.

B. Updated Citation to Court of Appeals Decision.

The Court of Appeals decision has been published. *Tomlinson v. Puget Sound Freight Lines, Inc.*, 140 Wash.App. 845, 166 P.3d 1276 (2007).

C. Response to Statement of Issue Presented on Review.

The Petition injects considerable argument into its description of the issues presented. Objectively phrased, employer perceives the essential issues to be:

1. As a matter of law, does the phrase "preexisting permanent disability" in RCW 51.32.080(5) exclude disability attributed to preexisting arthritis conditions that are degenerative in nature and therefore, Tomlinson argues, not "permanent" within the legal meaning of the phrase?

2. Where a work injury aggravates a preexisting arthritic condition sufficiently to prompt surgical amputation and replacement of the diseased joint, does the permanent disability extant in the joint prior to the injury continue to qualify for the preexisting disability credit otherwise required by RCW 51.32.080(5)?

3. Tomlinson's issue statement also foreshadows later assertions that his pre-injury arthritis condition was not under active treatment or "restricting function" at the time of the work injury, and therefore was "not disabling." (Petition, p. 1; *see also* Petition, pp. 2, 4, 8-9, 15-16). That assertion is decidedly at odds with the findings of fact below and in

any event violates RAP 2.5(a), which precludes consideration of issues not preserved on appeal. As the Court of Appeals decision correctly noted, Tomlinson failed to preserve a challenge to contrary findings entered by the agency judge:

> In addition, the [Industrial Appeals Judge] *** found that Tomlinson's degeneration arthritis was disabling before the work injury. Tomlinson has not challenged this finding and when he stipulated that the trial court's summary judgment ruling left no issues to be tried, he waived any challenge to the IAJ's findings.

Tomlinson, 140 Wash.App.2d at 855.[1]

Accordingly, before this Court, Tomlinson may contest whether permanent impairment caused by degenerative arthritis generically qualifies as "permanent disability" within the *legal* meaning of RCW 51.32.080(5). He may not, however, dispute the established facts on this record that arthritic symptoms and articular damage prior to the work injury caused a need for considerable treatment and an intractable level of quantifiable permanent impairment. That *factual* issue was finally determined by the IAJ based on substantial evidence in the record and was not preserved before the Superior Court or the Court of Appeals.

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[1] Employer argued this waiver in its brief to the Court of Appeals. Neither claimant's Appellant's Brief to that Court nor the Petition for Review offered disputed or rebutted this critical point.

D. Response to Discussion of Case Significance.

This case is significant in that the Supreme Court has not addressed the intent or operation of RCW 51.32.080(5) since its decision 60 years ago in *Beyer v. Department of Labor & Industries,* 17 Wn.2d 29, 32, 134 P.2d 948 (1943). The Court of Appeals decision was sound, however, and does not pose the policy concerns outlined in the Petition for Review. To the contrary, affirming it would preserve and reinforce the statute's traditional and fair role of assuring compensation to workers for incremental permanent disability caused by a work injury without requiring the system or employers to provide a "remedy" for levels of permanent disability the worker had already incurred (and in this case been compensated for) prior to the work injury.[2]

The underlying remedial purpose of the Act was very much observed in this case. According to the findings of fact below, claimant brought to his employment a longstanding, advanced and chronically

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[2] The Petition objects that workers like Tomlinson with a preexisting 50% permanent disability of the knee would "get no PPD at all" if a total knee replacement produced a "good" or "fair" outcome, i.e. resulted in a retained level of 37% or 50% permanent disability. (Petition, p. 6, note 9). The Petition does not appear to appreciate that its position would require payment of permanent disability benefits, even where a knee replacement produced a good result, leaving less permanent disability than existed prior to the work injury. Nowhere does the statute evince an intent to provide a permanent partial disability award for a reduction in the worker's permanent disability.

problematic arthritic condition in his left knee. It had already prompted years of documented treatment, a Veteran's Administration permanent disability award, and a prognosis that contemplated an inevitable knee replacement independent of any additional injury. As the Court of Appeals noted, that history and the "bone-on-bone" contact of articular surfaces documented by imaging studies persuaded the medical experts and the IAJ that the permanent disability existed before the work injury and could readily be quantified under the AMA *Guides* at 50% disability of a leg. *Tomlinson,* 140 Wash. App. at 852-853.

Notwithstanding that history, when Tomlinson sustained a work injury that contributed incrementally to the preexisting arthritis, employer appropriately undertook workers' compensation responsibility for the entire condition. Mr. Tomlinson has and will continue to be afforded the panoply of workers' compensation benefits available in the form of extensive medical treatment and knee replacement surgery, recuperative therapy, time loss and, if applicable, vocational assistance. Those benefits have or will be delivered without any discount or apportionment as appropriate for a condition rated at 75% permanent disability

– just as if his work injury had originated the entire condition. [3]

The Court of Appeals here merely recognized a longstanding and intuitive limitation in calculating the payment for just one of the categories of benefits (permanent partial disability) available to the worker – a limitation plainly set forth in RCW 51.32.080(5). *See Beyer v. Department of Labor & Industries,* 17 Wn.2d 29, 134 P.2d 948 (1943). That statute implicitly acknowledges how incongruous and inequitable it would be to order employers to provide a "remedy" to compensate a worker for a level of permanent, non-work disability that was, in the words of the statute "already" incurred before the work injury even happened. RCW 51.32.080(5) (offset applies only where worker injures a body part that was "*already* ... permanently partially disabled").

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[3] Tomlinson's Appellant's Brief and the Petition for Review take excessive license when they state the "Department ordered PPD of 25 percent." (App Br, p. 11; Petition, p. 3). The Department's Order and Notice of January 14, 2005 stated, "The self-insured employer is directed to pay you a permanent *partial disability award of 75%* of the amputation value above knee joint ... less preexisting 50.00% of the amputation value ...." For all benefits purposes other than the credit to be applied in calculating the payment due, the Department Order reflected an ultimate "PPD award" of 75%. The credit only reduced the amount of the PPD payment, not the cumulative level of disability rated and acknowledged in the PPD award.

Contrary to arguments offered in the Petition, the Court of Appeals decision here effectuated *both* the general, beneficent purposes of the Act and the specific policy limitation stated in RCW 51.32.080(5). It was also consistent with the historical interpretation of that statute applied consistently by the Department and the Board since the *Beyer* decision. If adopted, claimant's position is the one that entails departing from an established principle of compensation and thereby cast a "pall of confusion" over the system. (Petition, p. 6).

E. Response to Arguments for Review.

Most of the substantive and procedural infirmities in Tomlinson's arguments were addressed by the Court of Appeals decision or employer's Respondent's Brief below. A few points warrant supplemental responses:

1. The legal definition of "permanent" proposed by petitioner would preclude compensation for workers seeking benefits for degenerative conditions that now routinely qualify for permanent disability awards. The Petition strings together several case law excerpts

and rules provisions[4] as authority for the proposition that impairment ascribed to progressive or degenerative conditions like arthritis may never qualify as "*permanent* disability" within the legal meaning of that term under workers' compensation principles. (Petition, pp. 11-13). It further argues that degenerative arthritic conditions may not serve as the basis for "permanent" disability if, at some point in the future, they might necessitate treatment in the form of a joint replacement. (Petition, pp. 13-14). The Court of Appeals decision provided a cogent and persuasive rationale for rejecting what it termed Tomlinson's "strained" interpretation of the phrase. *Tomlinson,* 140 Wash.App. at 855-858. Employer endorses and adopts Judge Armstrong's reasoning in addition to

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[4] The Petition cites a definition of "permanent partial disability" it ascribes to WAC 296-20-01002. (Petition, p. 13). As Judge Armstrong's opinion noted, that provision was deleted. *Tomlinson,* 140 Wash.App. at 857, note 4. The language was significantly modified and now appears in WAC 296-20-19000 under the caption, "What is a permanent disability *award*?" The pertinent portion of the displaced rule now reads:

> Permanent partial disability is any anatomic or functional abnormality or loss after maximum medical improvement (MMI) has been achieved. At MMI, the worker's condition is determined to be stable or nonprogressive at the time the evaluation is made.

As the Court of Appeals also noted, RCW 51.32.080(5) includes preexisting permanent disability that was not submitted for any award and only applies to claims in which the claimed condition has already satisfied the rules and criteria necessary to enable a rating and subsequent application of the PPD credit.

reasserting the arguments previously offered in its Respondent's Brief.

In addition, Tomlinson's proposed interpretation of the term "permanent" is simply untenable in this context, primarily because it proves too much. The Petition itself (at page 4) acknowledges the AMA *Guides* include provisions for the rating of permanent disability attributable to "arthritis." The PPD *Guides* would not include standards for rating disability in knees compromised by arthritis if such conditions were intrinsically non-ratable. Indeed, at oral argument before the Court of Appeals, Tomlinson's skilled and experienced counsel acknowledged he has assisted many workers in obtaining permanent disability awards for such conditions. The fact such conditions advance over time, produce chronically fluctuating symptoms, or might eventually prompt replacements of the affected joints do not disqualify workers afflicted with arthritic conditions from obtaining awards premised on the establishment of permanent disability. By the same token, they do not disqualify such conditions from taking on the "permanence" necessary to qualify for the permanent disability credit countenanced in RCW 51.32.080(5). There is no principled basis to deem such conditions "permanent" in one context, but not in the other.

2. RCW 51.32.080(5) dictates a credit for permanent disability that preexisted the injury "from whatever cause," not merely an offset for

disability that continued to be caused by the preexisting condition at the time the subsequent work injury is rated. The Petition suggests RCW 51.32.080(5) allows for an offset of preexisting permanent disability only where such disability "accumulates" or "accretes" continuously between the date of injury through the date the work-related condition is rated for a permanent disability award. (Petition, pp. 8-9). It contends Tomlinson's permanent impairment at the time of rating did not reflect an accumulation of impairment due to the worsened arthritis because such impairment had been removed along with the diseased joint and supplanted by impairment caused by the supervening, unsuccessful total knee replacement ("TKR"). The latter impairment, Tomlinson argues, "resulted from the TKR, alone." (*Id.*).

This construction is unsound in at least two regards. First, it artificially defines away the ongoing contribution of the preexisting arthritis to the need for surgery and, therefore, to its associated consequences. The knee replacement itself was necessitated by both the preexisting arthritis and the aggravation of that condition ascribed to the work injury. If the contribution of the preexisting arthritis ceased upon excision of the arthritic joint, then the contribution of the work injury by aggravating the arthritic joint also disappeared. Under such reasoning, neither the work injury nor the preexisting condition continued to

contribute to the permanent disability caused by the failed knee replacement, and the worker would be entitled to no award at all.

A second and admittedly stronger response is that petitioner's construction of the statute cannot be reconciled with its text. The Petition argues that RCW 51.32.080(5) only applies where a work injury "aggravates" or "increases" the permanent disability already caused by a preexisting condition. From there, it reasons that the credit only applies where the aggravated preexisting condition continues to contribute to permanent disability at the point in time the work condition is ultimately rated. (Petition, pp. 8-9). The first proposition is accurate, but the second one does not follow.

The statute is certainly triggered by the occurrence of a work injury that increases or aggravates the level of preexisting permanent disability in a body part (or necessitates its amputation). That circumstance does not, however, constrain the calculation of the credit. Tomlinson's argument disregards the separate language in the statute which effectively specifies application of a credit "adjudged with regard to the *previous* disability of the injured member or body part" where such body part was "*already*" disabled at the time of the work injury "from *whatever* cause." RCW 51.32.080(5) (emphasis added). It does not prescribe a credit adjudged "with regard to the *current* disability" caused

by the preexisting condition when rating the work injury. In other words, the statute prescribes a credit explicitly based on a comparison of the levels of permanent disability ascertained to exist at two different points in time, regardless of the cause of the preexisting disability. It does not dictate comparison or apportionment based on the respective contribution of work and non-work causes determined to exist at the point in time the injury is rated.

The Court of Appeals rightly rejected Tomlinson's argument in favor of the latter interpretation. 140 Wash. App. at 853-855. Its analysis and its conclusion comported with the application approved by the Supreme Court in *Beyer v. Department of Labor & Industries, supra.* There, interpreting a provision with nearly identical language, the Court affirmed a ruling that applied the disability payment credit for preexisting visual impairment even though a subsequent work injury necessitated removal of the entire eye. Under Tomlinson's proposed logic, the *Beyer* court would have ordered compensation for 100% of the vision loss attributable to removal of an eye without regard to the fact the eye was already permanently impaired from a different cause before the work injury.

Finally, the Petition studiously omits any discussion of the text in RCW 51.32.080(5) specifying application of the credit when rating

permanent disability for work injuries that necessitate "amputation" of a body part already impaired by a preexisting permanent disability. The Court of Appeals' decision rightly noted that Tomlinson's "strained" interpretation of the statute cannot be reconciled with the legislature's inclusion of amputations among claims subject to the statutory credit. 140 Wash.App. 855-856. In this case, Tomlinson's work injury aggravated or worsened the preexisting disability in a manner prompting "amputation" of the knee and installation of a prosthetic. Such circumstances qualified the claim for the statutory credit pursuant to the specific and unambiguous terms of RCW 51.32.080(5).

3. Neither the Court of Appeals nor the agency found the mere existence of arthritis or degenerative changes automatically established preexisting disability. The Petition charges the Court of Appeals with application of some kind of *per se* analysis that conclusively presumed a preexisting permanent disability from the mere diagnosis of preexisting arthritis or degenerative changes. (Petitioner, pp. 14-16).

That patently did not occur. As noted previously, the agency entered factual findings that Tomlinson had sustained preexisting permanent disability. It based those findings on substantial evidence in the form of expert opinions describing the medically probable effects of Tomlinson's preexisting arthritis based on his medical history, previous

Veteran's Administration determinations, and the advanced nature of the arthritis documented in imaging studies. 140 Wash.App. at 851-853, 857. Moreover, Tomlinson waived any challenge to those findings by stipulating there was "nothing left" upon which to have a trial after the Superior Court judge denied his motion for summary judgment.

4. The Court of Appeals did not approve a determination of PPD "contrary to the *Guides [to the Evaluation of Permanent Impairment]*." The Petition asserts the Court's interpretation of RCW 51.32.080(5) endorsed an agency analysis that contravened the well-established practice of following the *Guides* in the absence of a formal rule signaling the departure. (Petition, pp. 3-4). When rating permanent disability after a TKR, Tomlinson contends the *Guides* dictate evaluation and rating of the entire impairment with "no deduction for arthritis that TKR removed." (Petition, p. 4).

This complaint reflects a lack of precision in tracking the rationale utilized by the IAJ and courts below. The IAJ's findings heeded testimony that applied the TKR sections of the *Guides* to rate Tomlinson's ultimate disability at 75% of the amputation value. They also cited and applied expert testimony based upon the *Guides* to rate Tomlinson's preexisting level of permanent disability attributable to arthritic degeneration at 50%. Only then, pursuant to RCW 51.32.080(5), was one

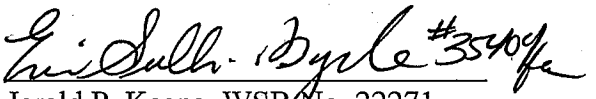
rating offset one *Guides* rating against the other in order to calculate the PPD payment actually due the worker.

Accordingly, Tomlinson's comparative levels of permanent disability were rated in accordance with the pertinent *Guides* provisions. Having done so, however, the agency correctly adhered to a separate statute that governs the amounts to be paid the worker pursuant to those ratings under the specific circumstances of this claim. The *Guides* do not relate to the calculation of payments for awards rated according to its formulas, so there was no conflict or failure to adhere to them. And even if the *Guides* did conflict with an explicit statute, the latter would necessarily control.

F. Conclusion.

The Court of Appeals' interpretation and application of the payment credit countenanced by RCW 51.32.080(5) was consistent with this Court's previous decision in *Beyer* and supported by the statutory text. Employer respectfully requests a decision affirming the Court of Appeals decision below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing **SUPPLEMENTAL BRIEF OF RESPONDENT PUGET SOUND FREIGHT LINES** on the following individuals on July 3, 2008, by *first class mail* to said individuals true copies thereof, certified by me as such, contained in sealed envelopes, with postage prepaid, addressed to said individuals at their last known addresses to wit:

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I further certify that I filed the original of the foregoing with:

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